Equality and Differences

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Hart says that 'the general principle latent in [the] diverse applications of the idea of justice is that individuals are entitled in respect of each other to a certain relative position of equality or inequality.' 'Hence', he goes on, 'its [justice's] leading precept is often formulated as "Treat like cases alike"; though we need to add to the latter "and treat different cases differently"'.[1]

Many touches in this part of chapter 5 of *The Concept of Law* remind us that in speaking of a principle or precept of justice, Hart was not affirming a moral principle, but stating what is 'traditionally thought'; he was recalling and seeking to account for what is often said, and for large structures of thought and practice found as social phenomena in many times and places. For, as Hart thought and exemplified in this great book, it is the business of philosophy and legal theory to 'make explicit the latent principle which guides our use of a word',[2] given that 'the extension of the general terms of any serious discipline is never without its principle or rationale, though it may not be obvious what that is.'[3] That is, what he says about justice, equality and difference in this book preserves the book's intended neutrality -- clearly articulated a few pages later in this chapter and reaffirmed in the Postscript[4] -- about whether there is any truth in morality at all. Not being under the pressures he felt to preserve that neutrality, I shall abandon it, rush in where he feared to tread, and hope to contribute a little to answering the plain question: What does justice require? What is the same, and what different, about us that might bear on right choice and action for any of us, and on good law?

Among the many aspects of this vast topic, I can here take up three: (i) the factual basis and normative grounds of equality; (ii) the proposed norm or principle of equal concern; (iii) equality as an aim of law and social policy pursued by selective prohibition of direct and indirect 'discrimination'.

1. *Equality's Factual and Normative Bases*

A lot can be done with the words 'each' and 'all'. The late-Roman jurists' definition of justice says it is the willingness to render what is due, as a matter of right, to *each*, and the same page of Justinian affirms that as a matter of natural right *all* human beings have been born free.[5] The implications can be articulated in the language of equality, and in a manner that seems to move from the strictly normative towards the factual (so to speak) or descriptive, as in Aquinas's formulations: 'nature made all of us [*omnes homines*] equal in liberty… for what is free is… an end in itself and none of us is ordered to another as [mere means] to an end'; 'all human beings are by

* The H.L.A. Hart Memorial Lecture in the University of Oxford, June 2011, revised and annotated.
[1] HLA Hart, *The Concept of Law* ([1961] 2nd ed 1994) [*CL*], 159.
[2] *CL* 14.
[3] *CL* 215.
[4] *CL* 168, 253-4.
[5] *Institutes of Justinian* 1.1.pr; 1.2.2; *Collected Essays of John Finnis* (2011) [*CEJF*] II, *Intention and Identity,* essay 1 at 22-3.

nature equal'.[6] This of course invites Rawls's question about 'the basis of equality, *the features of human beings* in virtue of which they are to be treated [unlike other living things] in accordance with the principles of justice'.[7] What are these features? And what gives them the normative significance wrapped up in Rawls's phrase 'in virtue of which they are to be treated'? When Jeremy Waldron, a quarter of a century later, surveyed the literature responding to Rawls's question about equality as a fact, he found it meagre, and tackled the question afresh.[8] To handle the fact that there are many inequalities between human beings, Rawls and Waldron invoke the idea of a range property – some binary or non-scalar property (one either has it or one does not) possessed by or applicable to a class of items that may also be understood in a scalar way, that is, may be understood in terms of a scale measuring the degree to which one possesses a scalar property associated with the binary property. So Rawls's answer to his own question invokes the range, non-scalar property of '[having] capacity for moral personality', though it exists in different people in different degrees and so is also scalar.

We can carry this a little further by giving the idea of capacity more attention than either Rawls or Waldron do. Not that capacity is not central to Rawls's account of human equality; after all, his answer to his fundamental question is: 'the capacity for moral personality is a sufficient condition for being entitled to equal justice', and to have moral personality is to be 'capable of having…a conception of [one's] good … and of having…a sense of justice…'[9] Infants have this capacity, he makes clear, because their immaturity is only a 'fortuitous circumstance' but for which they could take part in, for example, the hypothetical Original Position and its determination of principles.[10] Again, infants have the property of moral personality (a

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[6] Aquinas, *Scriptum super Libros Sententiarum Petri Lombardiensis* d 44 q 1 a 3 ad 1; for further citations, quotations and commentary, see Finnis, *Aquinas: Moral, Political and Legal Theory* (1998) [*Aquinas*], 170; also 313 at n 83.

[7] Rawls, *A Theory of Justice* (1972) [*TJ*], 504.

[8] Jeremy Waldron, 'Basic Equality', SSRN December 2008 (NYU School of Law, Public Law Research Paper No 08-61: http://ssrn.com/abstract=1311816), secs 1 and 2.

[9] *TJ* 505.

[10] *TJ* 509:

> the minimal requirements defining moral personality refer to a capacity and not to the realization of it. A being that has this capacity, whether or not it is yet developed, is to receive the full protection of the principles of justice. Since infants and children are thought to have basic rights…, this interpretation of the requisite conditions seems necessary to match our considered judgments. Moreover, regarding the potentiality as sufficient accords with the hypothetical nature of the original position, and with the idea that as far as possible the choice of principles should not be influenced by arbitrary contingencies. Therefore it is reasonable to say that those who could take part in the initial agreement, were it not for fortuitous circumstances, are assured equal justice.

The arbitrary or fortuitous circumstances presumably include, therefore, the circumstance of being as yet an infant. Waldron, who applauds Rawls for treating marginal cases, not by watering down his range property but by considering them as special cases outside the range, seems to interpret Rawls as holding – or as if he held -- that infants do not have the capacity for moral personality, rather than as holding (as the passage just quoted from *TJ* 509 seems to me to imply) that their 'potentiality' for moral personality brings them within the range property. Still, Waldron thinks Peter Singer is not sensible in looking only to actual capacities (say adult chimpanzee's compared with young human infant's). In Waldron's view, we should hold like Locke that children are born not *in* a state of equality but *to* a state of equality which they will in due course attain; and Waldron holds this on the ground that the infant's 'capacities (both actual and potential)' are sufficiently 'related to' the capacities included in the relevant range property (say reason, or moral personality). But he offers no reason to prefer this view to Rawls's, nor any reason to treat the relationship of potentiality as sufficiently related to actual capacity, and makes no exploration of the relevant ideas of potentiality and capacity. Neither he nor Rawls shows any interest in the idea of an actual

property defined by capacity) because it is a range property, just as 'the property of being in the interior of the unit circle is a range property of points in the plane. All points inside this circle have this property… And they equally have this property, since no point interior to a circle is more or less interior to it than any other interior point.'[11] Plainly the term 'equally' is here used equivocally by Rawls; for though mathematicians use the sense of 'interior' stated by Rawls, and lawyers speaking of the jurisdiction of a Ministry of the Interior will agree that no place within its jurisdiction is more interior than any other, there is nonetheless, also, an obvious sense in which points don't have the property of interiority equally -- points at or near the circle's centre are more interior than points just inside the circumference.

Similarly in need of disambiguation is the word 'capacity'. The English child's capacity to speak Chinese can be distinguished from its capacity to talk, and this activated capacity to talk (in English) should be distinguished from the radical capacity to talk that it had at or before birth. ('Radical', from *radice*, at root.) It had this radical, root capacity not only before birth but as far back towards conception as you like to go, a capacity that mouse (or frog) embryos of comparable size altogether lacked.[12] Waldron speaks at one point of 'capacities (both actual and potential)'; but a radical capacity is actual, not merely potential, though the potentialities it involves are not yet activated. And when radical capacities are activated, in a condition of relative maturity, they do not cease to be radical, but remain so, continuously carrying one wholly or partially through times of sleep or coma or illness or injury. One's genomic constitution is a material manifestation and a cause of such radical capacities. Referring to one's life is another way of articulating their reality and continuity. Losing all such capacities is losing one's life, one's very reality as a human being.

Capacities actually exist before, perhaps long before, their activations; but to understand capacities, one needs to look to those activations or actuations, at their fullest. Acts of meaning (say in conversation), like other intentional acts, are understood -- by those who choose to do them, and by intelligent participants and observers -- as actions *of* an individual, a responsible person, author of and answerable for his or her conduct, each capable of honesty or dishonesty, fidelity or untrustworthiness, and hope, indifference or despair. Such acts and dispositions to act manifest the person, someone whose complete, non-fungible distinctness from other human persons the human infant begins to be aware of, and soon enough to understand, as the baby locks onto and follows *eyes* and learns to read them, i.e. to make inferences from them as compelling as if they were windows of the soul—the intentionality, emotionality, sensitivity—of the person whose eyes they are. Vastly more transparent to each of those persons is his or her

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radical capacity – the idea implicit in the traditional notion of ensoulment, though intelligible (albeit not fully explicable) without reference to soul.

[11] *TJ* 508. Rawls uses the categories of 'belonging to a class' (508) and 'kind of beings' (505) synonymously with 'having the range property' of having natural capacities for that kind of functioning that he sums up as 'moral personality' (509).

[12] On radical capacity see Finnis, 'Euthanasia and Justice', in *CEJF* III, essay 14 at 219-20, 239; '"Public Reason" and Moral Debate', in *CEJF* I, *Reason in Action*, essay 16 at 273.

own individuality, responsibility (authorship), and subsisting identity as all at once (like a word spoken or written) both bodily and mental or (to put it more sharply) spiritual. Equally indubitable (as if it were transparent not inferred) is the fact that other persons have the same *kind of*—and therefore in each case thoroughly particular, non-replicably individual – identities, transparent-to-self and partially self-shaped. Despite their difference, each of these logically distinct kinds of knowledge of the person fits easily within our idea of the experienced and perceived.

Together these ways of knowing oneself and others as not only intelligible but also intelligent, not only active but each a doer and maker, provide the stable factual basis both for predicating a factual, descriptive equality between oneself and others, and for those practical norms which centre on 'Do to others as you would wish them to do to you, and don't do to them….'. Such norms or principles, being about what is needed to instantiate the good of being reasonable *and* the good of friendship, are not inferred from their factual foundations, but rather take those facts as the matrix, so to speak, for the practical insight they articulate: that a way of relating personally and humanely to other persons is not only factually possible but also desirable, intelligent, and in itself incalculably superior to alternative ways of relating (such as sadistic or contemptuous harm-doing, or sheer indifference to the baby in the snow alongside one's path). So: saying that those principles are 'about what is needed to instantiate the good of being reasonable … etc.' turns out to mean, unpacked, that they are about what is needed to be a person who respects other persons, for their own sake, and sees the need to give to *each* of them their due (*ius suum*: their right), and indeed (though in ways involving all manner of prioritization and nothing merely sentimental) the need to love—will the good of—these neighbours *as oneself*. The neighbour principle just articulated both presupposes and guarantees, indeed entails, a decisive equality.

One's identity (as a person with interests[13] that are truly intelligible goods) all the way back to one's beginning as a pre-implantation embryo[14] (with the radical capacities whose ultimate objects—those same intelligible goods—one now participates in and deliberately intends) is the ontological (that is, factual) foundation of one's human rights, because it is the foundation of one's judgment that 'I matter' *and* of one's duties to respect and promote one's own good, *and therefore* of one's judgment that 'others matter' and of one's duties to other persons to respect and promote their good. For they too

[13] Ronald Dworkin, *Justice for Hedgehogs* (Harvard UP, 2011) [*JfH*], 19, 265, makes fundamental a 'principle of humanity' (he calls it Kant's principle): that 'humanity in all its forms' must be respected. 'The first principle of dignity holds that human life is of intrinsic importance, and that principle necessarily included the life of a human fetus, which is undeniably a human life' (376). But, he says, 'an early fetus has no interests of its own, any more than a flower does'; so 'a fetus cannot be supposed to have rights protecting its interests' (377). The proposition about 'interests of its own' is undefended (flowers do not even seem to have any relevant radical capacity, such as for intelligence and will). Dworkin refers hereabouts to his *Life's Dominion* (1993) to supply reasons, but once we distinguish, as *Life's Dominion* (1993) does at 201-2, 235-6, between 'experiential' and 'critical' interests, the latter standing for the intrinsic, objective importance that someone's life go well, it is evident that each of us has, even at the earliest and most unconscious phases of life, '[critical] interests of our own" in what is done to us by way of harm or benefit. Dworkin's position about interests is incoherent with his principle of humanity.

[14] See *CEJF* II, essay 16 (1993a).

have such identities (all the way back, and all the way forward to the end of their lifetimes), such radical capacities, and intelligible forms of flourishing (and harm) of just the same kind as one's own. Just as immaturity and impairment do not, in one's own existence, extinguish the radical capacities dynamically oriented towards self-development and healing, so they do not in the lives of other human persons. *There* is the ontological unity of the human race, and radical equality of human persons which, taken with the truths about basic human goods, grounds the duties whose correlatives are human rights—duties *to*, responsibilities *for*, persons, the duties summed up in the normative justice-principle: 'Like cases are to be treated alike'.

In short: if you ask how a factual, 'descriptive' property and equality can be the basis for any normative propositions about entitlements, justice and so forth, the answer is that such a fact can have, and has, the place in practical reasoning (in the 'practical syllogism') that some fact or facts must have in every such syllogism. The first or normative premise here is that life, knowledge, friendship and so forth are goods, to be favoured in my existence and in the existence of anyone like me. The second premise is that in one respect at least, every human person is 'like me'. The normative conclusion follows: precisely as possessing the radical capacity for moral personality (just to use Rawls's term for it), everyone is to be treated alike.

2. *Content and Limits of the Equality Norm*

And *relevantly* different people are to be treated differently. It will be interesting to explore this dimension of Hart's master principle of justice in the company of Ronald Dworkin. The advance summary with which he begins his fine new book, *Justice for Hedgehogs*, starts: 'No government is legitimate unless [it shows] equal concern for the fate of every person over whom it claims dominion.'[15] The book itself, long before we get to its exposition of the politico-legal principle of equal concern, elaborates, powerfully, a conception of *personal* responsibility, including in outline all 'our various responsibilities and obligations to others'.[16] And here a key proposition is: 'only in some special roles and responsibilities – principally in politics – do these responsibilities to others include any requirement of impartiality between them and ourselves.'[17] Dworkin finds many ways to stress the wide *in*applicability, or rather the very qualified applicability, of impartiality as a moral requirement of just conduct towards others. Though the principle of equal concern is applicable in the interactions of individuals or non-governmental groups, *equal concern* for the fate of others turns out to be compatible with all sorts of prioritising of one person over another.

Thus (he says), if you can rescue *only* either a lone shark-threatened swimmer or a pair of shark-threatened swimmers, you can reasonably and justly choose to rescue the one if you have a good reason for the choice -- the lone swimmer is your friend, or your wife, or is much younger than the

[15] *JfH* 2.
[16] *JfH* 13.
[17] *Id.*

others, or is a brilliant musician or philosopher or peacemaker. And this is because your having such reasons for the choice entails that 'you do not imply or assume that the lives of the two you abandon are objectively less important than' the life of the one you rescue.[18] In the absence of such reasons, of course, you should rescue the two, for 'the principle that it is better to save more rather than fewer lives, without regard to whose lives they are, is a plausible, even if not inevitable, understanding of what the right respect for life's importance requires.'[19] Again,

> I can accept with perfect sincerity that your children's lives are no less important objectively than the lives of my own and yet dedicate my life to helping my children while I ignore yours. They are, after all, my children.[20]

Dworkin draws a reasonable distinction between harming and not helping, and accepts, defends, and applies (under this very name) the 'principle of double effect' – that is, the thesis that there is a genuine moral difference between what one intends and what one accepts as a side-effect, when it is a matter of assessing whether the harm one's actions cause another is unjustly or in any other way wrongly done. And, to distinguish cases where failing to rescue is unjust because showing an indifference to the importance of human lives, he applies a neighbour principle based on proximity ('degree of confrontation between victim and potential rescuer'[21]).

All this seems right. My discussion of justice and rights in *Natural Law and Natural Rights* expressed the point differently, arguing that no one can reasonably treat with equal concern and respect everyone whose interests one could ascertain and affect; not only is it permissible for an individual or a government not to treat everyone as entitled to equal concern, it is *wrong* for individuals or governments to treat everyone with equal concern. The proper principle is, rather, that everyone is equally entitled to respectful consideration, a consideration that can instantly warrant *treating* different people very differently and with very great differences in the *concern* one shows for their wellbeing.[22] Dworkin prefers to say that (i) everyone must always be treated by everyone with equal concern, but (ii) this is often compatible with simply ignoring almost everyone, as parents attending to their own children's needs are entitled simply to *ignore* (Dworkin's word) all or virtually all other children. This, then, is not a dispute or disagreement, but a difference in terminology.

This substantial agreement shows how unlikely it is that, when we shift from personal to political responsibility (and thus to constitutional, legislative, or other political authority), there can be many, if any, straightforward decisions about the implications of, and how to give effect to, that political principle which Dworkin calls sovereign – 'No government is

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[18] *JfH* 281.
[19] *JfH* 283.
[20] Ibid., 274. In the context, 'without regard to' here is subject to the proviso just discussed, about reasons for setting aside this principle.
[21] Ibid 275.
[22] *NLNR* 173-4, 177, 223.

legitimate unless [it shows] equal concern for the fate of every person over whom it claims dominion'. Just how will the *political* principle work out in reasonable practice, if it is true that in the non-political domain I show equal concern for the fate of all three shark-threatened swimmers when I abandon two or more to their fate to rescue my friend – but not when I shoot one or more of them to distract the sharks from my friend[23] -- or if parents who can vividly see wide differences in intelligence and other competences between their children can nonetheless maintain equal concern for all of them (in Dworkin's sense), and do not cease to do so by spending much more on preserving the health of one and on fostering the remarkable talents of another than on their other children?[24] I think it is fair to say that whatever Dworkin gets the political principle of equal concern and respect to deliver comes from its combination with the other principle he treats as sovereign in politics; that law and government must 'respect fully the responsibility and right of each person to decide for himself how to make something valuable of his life.'[25] Just how plausible that 'principle of ethical independence' can be thought to be, and what if any stable clarification and application it can be given, are matters (often debated between us)[26] that I cannot pursue here. I want instead to indicate one or two other features of the principle of equal concern as it applies to politics and government.

Notice first that it applies only in relation to 'those under [the government's and law's] dominion'. Dworkin thus (unless I am mistaken) avoids confronting explicitly the claims of persons who are not citizens or residents of the government's territory; implicitly, he ignores to the point of denying those claims, but keeps the issue just out of sight by abstaining from confronting the phrase 'those under its dominion' with the would-be immigrant, seeking a better life, who is certainly under the dominion of our government when he emerges from the recesses of a lorry in Dover and then or later claims a right (or simply requests, or presumes, permission) to stay, reside, become a citizen, bring his extended family in the interests of his right to private life, and so forth, a claim which could and, if our government

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[23] See *JfH* 285-96.

[24] Here one tests Jerry Cohen's master exemplification of his 'luck egalitarianism' (which Dworkin rejects but which leaves its traces in Dworkin's thinking): ie the thesis that justice requires the elimination of all inequalities arising from luck (as distinct from the consequences of choices). Cohen's master exemplification: irremovable and non-transferable but destructible manna falls from heaven into Jane's possession, but nobody else's, in a peacefully anarchic state of nature. What justice calls for, says Cohen, is that she destroy her manna rather than make use of it (a use that could only be to her benefit alone): 'How to Do Political Philosophy' in GA Cohen, *On the Currency of Egalitarian Justice and Other Essays in Political Philosophy* (ed Michael Otsuka) (Princeton UP, 2011), 229. Though the analogy between talent and manna is far from perfect, it is close enough to suggest what is involved in luck egalitarianism, in which (in principle) it is better to destroy human good rather than allow it to be participated in unequally. Families who nurture the talents of one child even though the talents of others must lie fallow (whether or not the family's surplus income after provision of basic necessities is devoted to the talented one they choose to support) all show their repudiation of luck egalitarianism. Indeed, they seem to show their rejection of any interpretation of 'treat all with equal concern' that would even place a question-mark against their choice to devote vastly more to one child than to the others, where the egalitarian alternative would yield only small (albeit real) benefit to those other children. And their rejection of egalitarian interpretation of 'equal concern' seems to be sufficiently justified by the intrinsic human good involved in a developed musical-compositional talent or – to revert to the other case, of favouring two out of many children – in a medical career which will never benefit the siblings left back in the village. Such families rightly regard the luck egalitarian principle as no principle of justice, indeed (often enough) as immoral.

[25] *JfH* 3 (for 'sovereign' see 321).

[26] See eg *NLNR* 221-3; Finnis, 'Duties to Oneself in Kant', *CEJF* III, *Human Rights and Common Good*, essay 2 at 51-3.

permitted it, doubtless would be repeated millions, or tens or even hundreds of millions, of times. There are few more urgent real-life questions of political justice, and few if any in which our law is now so deeply involved, as whether and why government and law can justly treat all its nationals alike at the border – namely as entitled to enter – and all non-nationals differently from nationals – namely as entitled only to enter, if at all, by permission which can be justly withheld quite freely except in certain cases of persons fleeing imminent persecution or starvation, and terminated whenever that dire necessity is past.[27] About all this our political philosophy and discourse largely, like Dworkin, remains mute.

But not entirely. Rawls, late in his innings, developed a powerful and truthful, albeit brief, account of the justice of territorial boundaries.[28] We should help ourselves to his analogy of territory with property, and – forgetting national territories and boundaries for a moment -- remind ourselves of what is clear. No one comes into the world entitled by considerations of unaided reason – by moral principles as such – to any assigned parcel of the world's resources. Yet if we leave those resources to be used 'in common', available to all equally, and consumed by whoever gets to do so first or most forcefully, there soon ensue ruin for some or many, and poverty for all or almost all. And if we (who?) assign the resources all to a Distributor who assigns to everyone an equal fraction of the whole, to be developed or consumed or left fallow as each pleases, inequality and poverty again soon ensue. Or soon ensue unless by agreement or other arrangement the appropriation initiated by the Distributor is formalised in a system of property rights of broadly the kind developed by the Romans and again by our common law. In such arrangements, the interest of the life-tenant or usufructuary in short-term enjoyment is limited by rules against waste (*salva rei substantia*), the division of things and funds into capital and income encourages investment in productive methods and uses and enterprises, and the net result tends, regularly, despite innumerable incidental defaults and failures, towards the vast increase in prosperity that makes possible civilized culture, among many other benefits such as health. There may be great disparity of wealth (though even the common law puts limits on accumulation), but the condition of the worst-off and of everyone else tends to be materially improved so vastly, even before any voluntary or, failing that, compulsory redistribution of the kind that we summarise with terms such as 'welfare state' [29]– improved so much that the Biblical scheme for a jubilee (in effect a compulsory universal re-equalising of everyone's landed wealth every fifty years)[30] comes to seem an extravagance at best only symbolically related

[27] See 'Migration Rights' (1992), *CEJF* III, essay 2; 'Boundaries' (2003), *CEJF* III, essay 8; 'Law, Universality and Social Identity' (2007), *CEJF* II, essay 6 secs III and IV esp pp 118-121; 'Cosmopolis, Nation States, and Families' (2008), *CEJF* II, essay 7. On the equality of all persons lawfully within the realm, see 'Nationality and Alienage' (2007), *CEJF* III, essay 9.

[28] See Rawls, *The Law of Peoples* (1999), 23-5, 34-9; discussed in *CEJF* II, essay 7 at 124-7.

[29] I use the term with something like the sense it had in or in relation to William Beveridge's *Report on Social Insurance and Allied Services* (1942), Cmd 6404, in which the menace of idleness and squalor is kept in view along with the need to sustain maternity and maternal childcare, and the guiding principle is that the 'welfare' for which the state's assistance is provided is for citizens, and is primarily (though not exclusively) a matter of return for contribution.

[30] Leviticus 25: 8-52.

to the *common* good. And all this, ever so often verified and reverified again and again in the lifetime of Hart and his students, has a presupposition and a precondition. The presupposition is that people differ widely in their aptitude, and their dispositions, for prudent development and use of resources, but widely share a tendency to free-ride on the labour of others if free-riding by others is unconstrained. And the precondition, hidden just beneath the surface of the word 'property', and its conceptual cognates 'ownership' and 'holdings', is that non-owners are *excluded* from any use of the thing owned, save by licence of the owner or, in limited and specific ways, by law or by moral recognition of emergency necessity.

So likewise, as Rawls says, the prospering of communal life that we gesture to with terms like Rule of Law, democratic *Rechtsstaat*, or again 'welfare state', has a similar presupposition and precondition: the presupposition of a shared, extensively overlapping conception of common good, mutual sympathy and trust and well-grounded expectation of reciprocity; and the precondition of territorial dominion and settled right of exclusion of non-citizens. The presupposed shared conception of common good, the mutual sympathy and trust, and the expectation of reciprocity all seem to presuppose, in turn (as Rawls, John Stuart Mill, and John Paul II have all emphasised),[31] the kind of sharing of characteristics and memories that there is little or no reason to anticipate finding in sufficient measure outside the framework of *nation* states.

I have been recalling a set of strongly empirical claims, or rather two sets, the one about appropriation as opposed to communism, within the realm, and the other about territorial sovereignty. All claims about *needs* involve, in varying forms, this sort of combination of a state of affairs (often more or less complex) understood by practical insight as good, desirable, worthwhile more or less for its own sake and fundamentally, and a set of empirical conditions and means judged capable of bringing about that good by choices to do this and abstain (altogether or for now) from that. The decisive achievement of Hart's *The Concept of Law* and *Essays on Punishment and Responsibility* was their opening up of a more or less inward understanding of practical reasoning's essentially invariant structure, a structure apt for ranging dynamically over the immensely variable but strongly patterned content of human needs, predicaments, and intelligent forms of response to predicament and satisfaction of need. And this opening up included attention to the empirical as is demanded by the logic of the terms 'need', 'predicament', and 'intelligent response'.

In short, the very great benefits, *including internationally distributable or otherwise available benefits*, available on condition of stringently discriminating (treating people unequally) at the state's border provide the reasons for doing so that are equally reasons for concluding that this is no injustice, no denial of human equality or equality of concern, and is a proper instance of treating

[31] See *CEJF* II, essay 7. See also Joseph Raz's 'Multiculturalism', Ratio Juris 11 (1998) 193-205 at 202-3; discussed at *CEJF* II, essay 6 ('Law, Universality, and Social Identity') at 114-9.

different cases differently.[32] In saying so, I say no more than Dworkin, like many others, takes (to all appearances) for granted but does not rush in to say.

3. *Some Discrimination about 'Discrimination'*

In recent decades the long-settled conceptual framework of reflection and debate about equality has been in large measure translated into, and in some measure supplemented by, the conceptual framework whose key element is *discrimination*.

Of course, since like cases should be treated alike and different cases differently, one must discriminate between like and unlike, and between different sorts of difference. To do otherwise is to act without discrimination, that is without good judgment, indiscriminately. A good translation runs for a key sentence in the page of Plato's *Laws* which anticipates much in Aristotle's and Hart's discussions of justice and equality: 'indiscriminate equality for all amounts to *in*equality, and both fill a state with quarrels between its citizens.'[33]

Notwithstanding all this, decisions, certainly decisions in what may broadly be called public life, should surely be made without discriminating between persons on grounds that ought to be regarded as irrelevant to securing the benefits which the decision has in view. To eliminate *such* discrimination is to promote equality and is to respect (so far forth) the human right of each to equality of concern, or equality of concern and respect.

To understand the ways in which equality is and is not promoted in contemporary anti-discrimination law, one must begin by observing that this law regulates decision (choice) and deliberation. The law's structure mirrors the structure of practical reasoning. Deliberation about interesting ends and available means generates proposals for action, proposals (plans of action) that are sets of ends and means (each means except the very first moment of exertion, being also an end) considered capable (in combination) of yielding the benefits supposed to be sufficiently desirable to make the effort and action worthwhile. One intends all the states of affairs that are envisaged in the proposal as *to be brought about* as ends and means, and intends them under the description they have in that proposal as one shaped it in deliberation, not for purposes of justifying the action to others or rationalising it to one's own conscience, but for the sake of the benefit and efficacy these states of affairs are envisaged as having as ends and means. Everything included in the proposal is *a ground for* one's acting. Any other states of affairs brought about in or by the action, even though envisaged as liable or likely or indeed certain to be caused, are side effects just to the extent that they are not included in the proposal, whether as end or means, and are thus (by entailment) not intended. Anti-discrimination law accordingly has two topics and limbs: direct discrimination, which looks strictly to the decision-makers grounds for decision, and indirect discrimination, which looks to side effects.

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[32] See 'Migration Rights', *CEJF* III, essay 7; 'Boundaries', *CEJF* III, essay 8; and essays 6 and 7 in *CEJF* III.
[33] *Laws* VI: 757a (trans GMA Grube, rev CDC Reeve).

In England, statutory anti-discrimination law got going in 1965 by forbidding, in certain contexts, any refusing or neglecting to afford access or services to someone 'in the like manner and on the like terms' as others, '*on the ground of* colour, race, or ethnic or national origins'.[34] Vastly extended over the forty-five years between then and the Equality Act 2010, 'direct discrimination' is now similarly defined, its key element being less favourable treatment 'because of' some characteristic of a person that the law treats as properly irrelevant to, or an inappropriate ground for, a decision-maker's reasons for and proposal for action. The draftsmen of the 2010 Act insisted that there was no change of meaning or effect in shifting from the phrase hitherto universal, 'on the grounds of', to the phrase 'because of', the latter just being more intelligible, they asserted, to 'the ordinary user' of the statute.[35] The phrase 'on the ground of' is used in the controlling precepts of the European Convention on Human Rights (art. 14) and the European Union Charter of Human Rights, and judicial interpretation makes clear what a sound philosophical analysis of deliberation and intention would suggest, namely that the phrase's effect is to delegitimize any decision in which a forbidden ground counts in the reasoning towards or is referred to in the proposal adopted in the decision. The forbidden grounds, called by the 2010 Act 'protected characteristics' (that is, characteristics of a person or class of persons *qua* counted by the decision-maker as reasons for the decision), are now greatly extended beyond colour, race or ethnic or national origin. They now include also sex (and related characteristics such as so-called gender reassignment), religion or 'philosophical belief', age, disability, and 'sexual orientation' (defined so as not include orientation towards sex acts with young children, sub-human animals, multiple partners, or corpses).

Until the 2010 Act, the legal consequence of a decision's being directly discriminatory was straightforward: such a decision is unlawful and incapable of being legally justified. That remains the case for most of the forbidden grounds or protected characteristics. But the inclusion of age and disability meant that qualification was necessary, in the interests of the common good; direct discrimination on these grounds is legally justified if the decision-maker can show that taking this ground or characteristic into account as reason for less favourable treatment has a legitimate aim and is a 'proportionate means' of pursuing the aim.[36] The need for departing from the former universal equation of 'direct discrimination' with 'unlawful' is equally evident in relation to the EU Charter's list of protected characteristics, which include (over and above the usual obviously irrelevant characteristics) 'genetic features, language, … political or other opinion, [and] … property…',[37] each of which can obviously play a reasonable and sometimes

[34] Race Relations Act 1965 (Great Britain), s 1(3). For a lucid and revealing account of British anti-discrimination law by one of its scholarly architects, see Bob Hepple, *Equality: The New Legal Framework* (Hart Publishing, 2011).

[35] Explanatory Memorandum to cl 13 of the Equality Bill; see 'Directly Discriminatory Decisions: A Missed Opportunity' 126 LQR (2010) 491-6 at 496 (now 'Intention in Direct Discrimination', *CEJF* II, essay 14 at 275).

[36] Equality Act 2010, s 13(2) (age).

[37] Charter of Fundamental Rights of the European Union (2000), art 21(1); see likewise art 26 of the International Covenant on Civil and Political Rights (1966), articulating an obligation to guarantee 'effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or

an important role in just deliberation which results in treating different sets of people differently. Moreover, as we shall see, the Act itself *sponsors* some kinds of direct discrimination done with motives of a kind legislatively pre-assessed as desirable, reasonable or acceptable.

I said that the courts have interpreted direct discrimination in line with a sound philosophical understanding of practical reason. This needs, alas, some qualification. Just as not a few Catholic moralists have tended to muddy their act-analysis with the thought that some effects are so immediately or intrinsically related to an action that they must be judged to have been intended even though they played no part, either as end or as putative means, in the acting person's deliberations or proposal,[38] so too the courts have backed, confusedly, into treating some effects on the treatment of persons with a protected characteristic as effects so intrinsically connected with the decision-maker's deliberative grounds that they must be treated as grounds. So our highest court has held that it is direct discrimination on grounds of sex to provide free swims in municipal pools to persons of pensionable age, because male and female pensionable age is by statute different; and that it is immaterial whether the decision-maker was aware of this difference, and immaterial that no-one on the decision-making body has the slightest interest in treating people of different sex differently, and (by implication) that it would be immaterial if the difference was introduced by Parliament only after the decision-maker had set up the scheme of swimming-pool charges (and therefore could not have been a ground in deliberation about adopting the scheme).[39] This muddying of the 'grounds'/intentionality analysis has obvious potential for injustice in relation to any ground or characteristic not exempted (as some characteristics, such as age and disability, are) from the strict-liability, no-possible justification rule which dominates the law's provisions about *direct* discrimination. Nor is any good purpose served by this obfuscation, given the applicability in all such cases of the second limb of anti-discrimination law, *indirect discrimination*. Indeed, as American experience which I will shortly mention shows, any and every extension of the category of direct discrimination beyond the genuinely intentional serves to exacerbate a catch-22 that threatens the coherence of the entire body of anti-discrimination law.

Indirect discrimination, predicated not on any course of deliberation, grounds or intention, but on side effects, is a category introduced, that is made unlawful (in England), only in 1975, in the Sex Discrimination Act; it was extended to race in 1976 and of course to all the other now protected categories in 2010. What is it? As now defined, it occurs when person A applies to person B some provision, criterion or practice which, when applied to B and persons with whom B shares a protected characteristic,[40] puts such

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social origin, property, birth or other status.' It was fallacious for Lady Hale and those who concurred with her in *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2004] UKHL 55 to take it for granted that because a practice was directly discriminatory and therefore unlawful under the then Race Relations Act 1976 it therefore was contrary to the international conventions forbidding discrimination on grounds of race.

[38] See '"Direct" and "Indirect" in Action', *CEJF* II, essay 13 at 243, 248-9.

[39] *James v Eastleigh BC* [1990] 2 AC 751; for critique see op cit n 35 above.

[40] For these purposes pregnancy and maternity are not protected characteristics: Equality Act 2010, s 19(3).

persons (including B) 'at a particular disadvantage when compared with persons' who do not share that characteristic, and the provision, criterion or practice cannot be shown to be 'a proportionate means of pursuing a legitimate aim'.[41] This is, to repeat, a matter of side effects; the 'particular' differential impact on (disadvantage to) a protected group may be quite invisible on the face of the 'provision, criterion or practice' and neither intended nor foreseen in any way by the decision-maker (or anyone else). Indeed, just as the intended and the side effect are mutually exclusive categories, so the courts have been clear that a practice cannot be both directly and indirectly discriminatory.[42]

Now in general, just as it is right to exclude from grounds of decision characteristics (differences) that are irrelevant to the ends or means appropriately pursued by decision-makers, so it will often be right to require decision-makers to take responsibility for what they cause, especially when the effect is in some relevant way a disadvantage to someone – i.e. to take care to avoid unfairly imposing side-effects. So the aim of the legislation against indirect discrimination is, at least generally and abstractly speaking, morally good. But *its* means and *their* side effects, too, are subject to scrutiny, for their fairness and their impact (in other respects besides fairness) on the common good.

Obviously, there is some tension between the rationale of outlawing direct discrimination and the rationale for – or at least the inevitable effect – of outlawing indirect discrimination. The rationale of the former surely includes making society (in short) colour-blind, that is (more adequately put) banishing protected characteristics from decision-makers' deliberation (on the presupposition that they are irrelevant), so that decision-makers focus on the personal characteristics relevant to the task in hand.[43] But the law against

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[41] Equality Act 2010, s 19(2).

[42] See eg *R (E) v Governing Body of JFS* [2009] UKSC 15 at paras 56-7.

[43] The policy or principle if often expressed as 'that individuals should be treated as individuals and not assumed to be like other members of a group': *R (E) v Governors of the JFS* [2009] UKSC 15 at para 90 (Lord Mance); again:

> The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be assumed to hold the characteristics which the supplier associates with the group, whether or not most members of the group do indeed have such characteristics, a process sometimes referred to as stereotyping.

R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre [2004] UKHL 55 at para 74 (Lady Hale). Likewise, the principal dissenting judgment (by Stevens J) in *Boy Scouts of America v Dale* 530 US 640 (2000) begins (at 663): 'New Jersey "prides itself on judging each individual by his or her merits" and on being "in the vanguard in the fight to eradicate the cancer of unlawful discrimination of all types from our society"...' In *Marshall v Deputy Governor of Bermuda* [2010] UKPC 9 at [53], [54] (concurring judgment), Lady Hale said:

> It is hard to think of a more obvious case of sex discrimination than to oblige the members of one sex to join the armed forces of their country while allowing members of the other to choose whether or not to do so. …. It is plain … that some of the roles performed by the Regiment could just as well be performed by women. It is also plain that an individual woman may be just as capable of carrying out all of the roles performed by the Regiment as an individual man. To assume that she cannot, as Lord Hoffmann put it in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, at para 16, 'offends the notion that everyone is entitled to be treated as an individual and not a statistical unit'.

Of course, in most cases the conscription which Lady Hale complains is not extended to women cannot possibly be other – *even if unisex* -- than an instance of treating persons as 'statistical units' or, less prejudicially put, as members of a class: citizens of the age presumptively capable of engaging in combat more effectively than younger or older citizens. It is plain that some younger and older citizens are capable of performing all the roles carried out by combat troops, though the numbers soon become vanishingly small as one extends the ages away from the conscripted band in either direction. As other parts of Lady Hale's judgment accept, and Lord Hoffmann's original judgment made even clearer, the 'notion' is a presumption that is subject to countervailing reasons. And 'statistical unit' is just a subtly pejorative synonym for class or category or species or kind or type, or indeed sex.

indirect discrimination requires of decision-makers an unremitting attention to the categorization of everyone in terms of the otherwise banished, that is, the eight relevant protected characteristics, in the effort to ensure that there is no disparate impact on (particular disadvantage for) any of the resultant categories that cannot be *shown to be* 'proportionate to' the legitimate aim of promoting the task at hand. For it is a now settled part of the judicial interpretation of indirect discrimination that an unintended comparative disadvantage *cannot* – or presumptively cannot -- be shown to be justified as 'proportionate' unless the decision-maker 'addressed the issue of indirect discrimination' when deliberating about the provision, criterion or practice.[44]

Is there more than merely a tension here? Does our law fall into the impasse, the catch-22, that threatens American anti-discrimination law? That threat was illustrated recently by *Ricci v DeStefano*.[45] Like our law, Title VII of the Civil Rights Act 1964 as amended (particularly in 1991)[46] distinguishes between intentional discrimination ('disparate treatment') and discrimination by side-effect ('disparate impact' discrimination). The City of New Haven, Connecticut, wanted to make promotions among its fire service personnel based on, inter alia, tests of competence and relevant aptitude. For fear that fire personnel in a 'minority' ethnic group would not do well in such tests, an experienced test designer belonging to that ethnicity was engaged to compose the tests and did so with all this much in mind. Despite this and other efforts to make the test and its assessment favourable to that ethnic group, the fire personnel of that ethnicity performed disproportionately badly in the test. Given this disparate impact of the test, the City decided to make no promotions of anyone, and after years without any promotions was sued by fire personnel who had performed well in the tests and would surely have otherwise been promoted. The Supreme Court held (5: 4) that the City's decision to set aside the tests and freeze promotions in order to avoid (liability for) disparate-impact (indirect) unlawful discrimination amounted to direct discrimination, i.e. to race-based decision-making in violation of the Civil Rights Act's prohibition of taking 'adverse' actions 'because of race' – in this case, actions adverse to the non-promoted personnel in ethnic groups which had done much better in the tests. To avoid the catch-22 that *efforts to avoid unlawful indirect discrimination would always entail unlawful direct discrimination*, the Court ruled that that entailment does not hold where the decision-maker has 'a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action';[47] there

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[44] *R (Elias) v Secretary of State for Defence* [2006] IRLR 934 (CA); *R (E) v Governors of the JFS* [2009] UKSC 15 at para 100; Hepple, *Equality*, 71 (hardening the presumption into a strict requirement).

[45] *Ricci v DeStefano* 129 SCt 2658 (2009).

[46] See Pamela L Perry, 'Two Faces of Disparate Impact Discrimination', 59 Fordham L Rev 523 at 540–46 (1991).

[47] 129 SCt 2658 at 2677. The relevant belief concerns *de jure* liability in law, not merely the Legal Realist liability that would ensue as a result of predictably unreasonable or corrupt adjudication: see Alito J (concurring) at 2683:

> The Court holds—and I entirely agree—that concern about disparate-impact liability is a legitimate reason for a decision of the type involved here only if there was a "substantial basis in evidence *to find the tests inadequate.*" … The Court ably demonstrates that in this litigation no reasonable jury could find that the city of New Haven (City) possessed such evidence and therefore summary judgment for petitioners is required. (emphasis added)

Furthermore: as Scalia J (concurring) indicates, the assumption that such reasonable intent to avoid disparate-impact liability renders the race-conscious, discriminatory action lawful is hazardous; it remains possible – to be litigated some 'evil day' – that the statutory concept of disparate-impact liability created by Title VII of the Civil Rights Act

would be no such strong basis in evidence if the decision-maker had reason to believe it could defend its test-based promotions system as (in US terms) job-related and consistent with business necessity, and reason to believe that the complainants could not, in their turn, *show* that there was an alternative system for serving the employers' needs with less disparate impact.

Such a defence is very similar to our law's defence of legitimate aim pursued by proportionate means, though in our law the burden of proof is on the decision-maker *throughout*, not just at the legitimate-aim stage. Does our law elude such a catch-22, by defining direct discrimination by reference, not to 'adverse action because of [or on grounds of]' a forbidden/protected characteristic, but instead more precisely to actions which treat persons *less favourably than* others are or would be treated? The distinction seems tenuous, at best. At the very least we can say this: the *Ricci v DeStefano* scenario shows how actions taken to avoid indirect discrimination will generate plausible charges of injustice, between groups defined in terms of protected characteristics, wherever one of those characteristics is significantly correlated with capacities (aptitudes, competence) – that is, wherever the bell curves of distribution of such capacities differ significantly according to one or more protected characteristic(s).

Such resentments and charges can be illustrated more directly still by recalling the American cases about academic admissions, *Bakke* in 1978 and *Grutter* in 2003.[48] Normal academic standards for admission to a good university medical school (as in *Bakke*) or law school (as in *Grutter*) have a dramatically disparate impact in terms of the protected characteristic of race or ethnicity. If those standards were applied straightforwardly, almost no members of an ethnic group comprising nearly 15% of the US population would qualify for the existing good medical or law schools. The American medical and law schools have commonly adopted a practice of weighting applications so that, without setting a quota for members of particular under-performing ethnicities, the entering class will have a 'critical mass' of members of these ethnicities, in order (it is said) that all members of the class get the 'benefits' of being exposed to diverse ethnic groups. The dissenting minority judges in *Grutter* pointed out that in the law school involved in the litigation, this 'critical mass' varied from ethnicity to ethnicity in virtually direct proportion to the numbers of applications from those ethnicities. Not only did the effect approximate to a quota system of the kind unanimously declared unlawful by the Court in *Bakke*, but the differences between the 'critical mass' for minority ethnicity A and the 'critical mass' for minority ethnicity B cast doubt on the authenticity of the notion of a critical mass. And, as the Justice from the ethnic group most directly in issue vehemently observed, the effect of admitting comparatively under-qualified persons to make up the desired critical mass or quasi-quota was to racialise the class

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1964, and reaffirmed by Congress in 1991, is contrary to the 14th Amendment's constitutional guarantee of equal protection of the law, a guarantee that would appear to prohibit disparate *treatment*, ie the direct discrimination entailed by use of eg race as a ground for action adverse to a person or class of persons, eg persons who, in view of their good performance in, *inter alia*, the tests, would otherwise have been promoted in the New Haven Fire Service.

[48] *Regents of the University of California v Bakke*, 438 US 265 (1978); *Grutter v Bollinger*, 539 US 306 (2003)

atmosphere and stigmatise any members of the ethnic group who, as their classmates could scarcely know, had *earned* their place by the standards applied to the rest of the class.

Here we must pause to take stock, and to notice the final bit in the jigsaw of anti-discrimination law: 'positive action', a phrase designed, it seems, to avoid the American term 'affirmative action' while replicating the substance of its meaning. The disparate impact of academic tests and criteria on groups defined by a protected characteristic such as race can be made the subject of complaints of indirect discrimination, complaints by or on behalf of members of the group that does less well under those tests or criteria. The complainants in *Bakke* and *Grutter* were, however, from individuals *not* belonging to any ethnic group disadvantaged by tests or academic criteria, individuals who would in all likelihood have gained admission *but for* the 'positive measures' or 'affirmative action' taken by the universities to offset such disadvantage by admitting members of the ethnicities disadvantaged by (their own relative incapacity as measured by) the tests and academic criteria – admitting them in the interests of 'diversity' or 'critical mass' or other such projected benefits – with the effect of excluding from admission a good many persons who would have been admitted but for those positive measures. (None of this has anything to do with admissions based on predictions of the *future* academic superiority of persons who perform relatively poorly at the admissions stage.) The prohibition of indirect discrimination in the Sex Discrimination Act 1975 and the Race Relations Act 1976 was accompanied by provisions *permitting* positive action, as an authorized exception to the prohibition of direct discrimination. Both kinds of measure – the prohibition and the permission – were defended and are today acclaimed by the legal theorists of anti-discrimination law as a means to 'transformative equality'; Sir Bob Hepple, an architect of the Equality Act 2010, speaks of its measures as necessary for moving from merely 'formal' equality to 'substantive equality' (terminology employed in the European Court of Justice) or to 'what the EU calls "full equality in practice"'.[49]

What the Equality Act 2010 calls 'positive action' is direct discrimination (say on grounds of race or sex) that could not be legally justified but for the Act's provisions dedicated to authorizing it. And those provisions authorize it quite generally[50] whenever it is a proportionate means of pursuing an aim declared by these provisions to be legitimate, notably to 'enable or encourage' 'participation in an activity' (say, being educated at Oxford, or being a member of the Fire Service in Cambridge) by persons who share a protected characteristic (say, a certain ethnicity) and the decision-maker 'reasonably thinks' that people of that characteristic have a 'disproportionately low' participation in that activity.[51] Though I think they are often not seen in this light, these authorizing provisions could be regarded as, in part, a proleptic response to the threat of impasse or catch-22

[49] Hepple, *Equality* 9; see also 179-80 (including the quotation from Fredman, 'Facing the Future: Substantive Equality under the Spotlight' (2010)).

[51] Equality Act 2010, s 158(1), (2); also s 149 (1), (2) and s 159(1), (2).

threatening any measures adopted by decision-makers for fear that their policies or measures (say, their qualification tests) might be ruled discriminatory by reason of the tests' disparate impact on persons of a protected category. For, to repeat, what the provisions authorize is direct discrimination against persons belonging to categories *not* thought to be under-represented.

For 'disproportionately low' translates the academic-bureaucratic concept of 'under-representation'. What is under-representation? Suppose the number of persons sharing a certain ethnic characteristic who are admitted to Oxford University is very low compared with the number of persons sharing that characteristic as a proportion of the national and school population as a whole; and suppose further that the success rate of applications for admission by persons sharing this characteristic is also far lower than the success rate of applications by persons of all other significantly numerous ethnicities. Is this ethnic characteristic under-represented at Oxford? Suppose we now add that the success rate of persons sharing this characteristic in the final examinations (as measured by the percentage of candidates who achieve Firsts, Lower Seconds, Thirds and Fails) is very substantially lower, by all these measures, than any other numerically significant ethnicity. Perhaps, then, persons sharing this ethnic characteristic are *over*-represented – perhaps admissions tutors have been stretching to favour applicants of that ethnicity? (All these suppositions are in line with the raw ethnicity statistics published by the University of Oxford in July 2010.)[52] It has to be said that the published academic, bureaucratic/quango and NGO discussion of these matters, and of associated concepts such as 'pay gaps', 'barriers', 'prejudice', and 'glass ceilings', is often highly inattentive to evidence that would be relevant to a rational application of the concepts. The conduct of even-handed analysis and discussion of the evidence is too fraught with danger to reputation and career for this situation to improve in the foreseeable future. Yet these are concepts that, unless rationally applied, can scarcely fail to be both unjust and damaging to our common interest in the competent performance of tasks in which competence, on any view, really matters in terms of lives lost, permanent harms, and losses that truly blight.[53] And damaging also to our common interest in treating people as individuals, on their individual merits, and not as persons sharing (or not sharing!) some specially, 'affirmatively', or 'positively' (because 'under-represented') protected characteristic.

For almost all applications of 'positive action' involve direct discrimination and a zero-sum context: to the beneficiary of the action there

[52] See *Oxford University Gazette* 21 July 2010, Supplement to No 4925, pp 1332-3 'University of Oxford Race Equality Scheme: 2009-2010', tables 1 and 3a.

[53] That is not to say that all tests of competence are truly necessary to secure levels of competence truly needed for the task; sometimes tests are used in an effort to avoid more nuanced processes of assessing entitlement to or suitability for promotion, processes that would lay those conducting them open to accusations of favoritism or discrimination, accusations that are both difficult to rebut even when entirely ungrounded, and hazardous to the careers of those accused.

corresponds, one-to-one, a loser;[54] and unless the concept of under-representation has been rationally applied with full attention to evidence, swapping the loser for the beneficiary will have been at the expense of both present and future competence. To which one can add the bad side effects mentioned by Justice Thomas, dissenting in *Grutter*: the saddling of all those in that 'protected' or beneficiary grouping who participate (or participated) in the activity with the stigma of being *presumed* beneficiaries of affirmative action and disproportionately likely to be of at least relatively low competence; and, furthermore, the encouraging of a sense of entitlement and limited effort among those who anticipate being beneficiaries, and thus a perpetuating of relative incompetence among people who by reasonably sufficient effort *could* have raised their competence if not in this activity then in another humanly worthwhile and beneficial activity.[55]

Consider two very simple illustrations of some basic elements of a far-reaching, complex set of problems. First: women make up half our population but about one twentieth of our prison population. But it would be foolish to speak of female under-representation in incarceration; for everyone knows, in a broad sort of way, that most crime is committed by men. Second: members of an 'ethnic group' (as the modern official jargon goes) comprising about 3% of the population of England and Wales commit about 15% of the homicides; victims of homicide among the majority ethnic group are disproportionately likely to have been unlawfully killed by a member of that ethnic minority, while homicide victims from that same minority are even more disproportionately likely to have been unlawfully killed by a member of their own ethnic group. Where the homicide is by gun, the probability that the offender and the probability that the victim belonged to that ethnic group is even more significantly higher.[56] But circumstances such as this are commonly not mentioned, let alone critically analysed as they need to be, when the facts are publicized about the relative rates at which members of ethnic groups are victims of homicide, or are stopped by the police on suspicion of carrying weapons. And what I have said about ethnicities, by way of simple illustration, applies also to different religious groupings and, in different ways again, to other groupings as defined by protected characteristics.

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[54] Thus the complainants in *Bakke* and in *Grutter v Bollinger* were in each case an individual who would in all likelihood have gained admission *but for* the 'positive measures' or 'affirmative action' taken by the relevant university by admitting instead a member of an ethnicity disadvantaged by (its own relative average incapacity as measured by) the tests and academic criteria – and doing so in order to offset such disadvantage, in the interests of 'diversity' or 'critical mass' or other such projected benefits – with the overall effect of excluding from admission a good many persons who would have been admitted but for those positive measures. As Thomas J, concurring in *Parents Involved in Community Schools v Seattle School District No 1* (2007) 551 US 701, 127 S Ct 2739 at 2775 (Part IIA), remarks:

> every time the government uses racial criteria to "bring the races together"… someone gets excluded, and the person excluded suffers an injury solely because of his or her race. … This type of exclusion, solely on the basis of race, is precisely the sort of government action that pits the races against one another, exacerbates racial tension, and provoke[s] resentment among those who believe that they have been wronged by the government's use of race.

[55] *Grutter v Bollinger*, 539 US 306 (2003) at 371-3 and 364-5 (Thomas J diss).

[56] See Ministry of Justice, *Statistics on Race and the Criminal Justice System 2010* (October 2011), Table A (p 11), pp 27-8, and Table 2.03 (p 29).

4. *Discrimination and Disproportionality*

The term 'proportionate means', which is the criterion for justifying decisions with a disparate negative impact, and for justifying positive (affirmative) action, has little or no connection with the concept of disproportionality deployed in talk of under-representation. Rather, means of pursuing a legitimate aim are proportionate (as that term is used in European and English law, ever-increasingly since the 1980s), if and only if they are rationally connected with a legitimate aim (an objective sufficiently important to warrant the negative side-effects of pursuing it), and are 'no more than is necessary to accomplish the objective'.[57] The phrase 'no more than is necessary' can again be clarified and specified, as it often is: having no more adverse impact on the enjoyment of *other* rights or protected interests than any available alternative effective means of pursuing the legitimate aim. A comparison of incommensurable, morally specified goods and bads is postulated both in judging the legitimacy of the aim and again in judging the 'necessity' and/or bad side-effects of alternative possible means (including the alternative of not pursuing the aim). The statutory structure may seem to go some way to making these comparative judgments rationally feasible,[58] by creating a *presumption* that disparate impact (inequality in outcomes) can be justified, and, contrariwise, that direct discrimination (disparity of *treatment*) can be used to (try to) undo 'under-representation'. The first of these presumptions, however, is offset by the contrary presumption implicit in the burden of proof placed by the Equality Act on the decision-maker whose decision has disparate impact. And this burden the Act does *not* impose on the decision-maker who discriminates to overcome so-called under-representation. So equalizing of outcomes is an aim now given a systematic advantage in the comparing of goods and bads.

Eliminating or minimizing the use of irrelevant considerations in decision-making in public life broadly conceived is, as I have said, a presumptively legitimate aim. As an implication of this, or in its own right, the opening up of public spaces and services, broadly conceived, to everyone properly within the realm, without discrimination on grounds not sufficiently related to the public welfare, is a legitimate aim, too. But acting justly involves not only the presumptively just aim of honouring the radical basic equality of all human beings, but also appropriate attention to the side effects of doing so, or doing so by the means you have in mind to adopt. That is why Aristotle is right to define justice – 'the good in the sphere of politics' -- not simply as treating like cases alike and different cases differently, nor simply as promoting 'geometrical' (proportional) equality in distributions and

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[57] The often cited test in *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80 is: 'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are *no more than is necessary to accomplish the objective*' (emphasis added). The phrase 'means used to impair' manifests the murky extension of intention discussed above, text at nn 38-39.

[58] It is not irrational to 'commensurate' (ie, rank) the evaluatively incommensurable, by feelings or commitments or by moral (or morally binding legal) norms the application of which is not dependent on a prior identification of the more valuable prospective outcome: see generally Finnis, 'Commensuration and Public Reason', *CEJF* I, *Reason in Action*, essay 15.

'arithmetical' (like for like) equality in exchanges and restitutions, but rather, and most fundamentally, as pursuing a soundly envisaged 'common good'. Common good, not least in the domain of political community, comprises interests and welfare that include many elements besides their being shared equally,[59] including many interests or aspects of wellbeing that may need to be pursued and promoted by measures departing widely from all but basic equality.

So in asking whether the provisions of the Equality Act and its like in other jurisdictions are just and practically reasonable law, we must consider their side effects, not only for any possible disparities the provisions involve (such as the zero-sum impact and disparate treatment involved in affirmative action or positive measures), but also for their bearing on other elements of the common good.

One kind of side effect is the Act's negative impact on established constitutional but now unfashionable rights such as freedom of association, freedom of religion and conscience, and freedom of parents to educate their children towards good forms of life, a negative impact which in each case involves also a very substantial shrinking, or invasion, of private life by coercive law. The requirement that parents who wish to band together to employ teachers for their children must be fully willing and ready to employ as teachers qualified applicants who live openly unchaste lives, according to the conception of chastity accepted by those parents and desired for their children's education, is oppressive -- an interference with their legitimate interest in associational freedom[60] -- and quite disproportionate, given that the only kind of unchastity protected by the Act is one indulged in by persons sufficiently few to find equally attractive employment in schools uninterested in promoting chastity, or that conception of chastity. The unreasonableness is only aggravated by the fact that the conception of chastity that I have just referred to is the one articulated and defended by the best philosophers, Plato, Aristotle and Kant included.[61] As a sound reflection on those philosophers' arguments makes clear, moreover, that understanding of chastity is directly related to the only understanding of human sexuality that is apt to sustain marriage as a good uniquely apt both for doing justice to the offspring of sexual relationships and for sustaining the wider community demographically.[62]

One element in the disproportionality just mentioned was the

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[59] Aristotle, *Politics* III.12: 1282b20-83a22.

[60] As is pointed out by the Supreme Court of the United States in *Boy Scouts of America v Dale* 530 US 640 (2000). Note what the Court says at 653:

> That is not to say that an expressive association can erect a shield against antidiscrimination laws simply by asserting that mere acceptance of a member from a particular group would impair its message. But here Dale, by his own admission, is one of a group of gay Scouts who have 'become leaders in their community and are open and honest about their sexual orientation.' Dale was the copresident of a gay and lesbian organization at college and remains a gay rights activist. Dale's presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.

[61] See 'Law, Morality and Sexual Orientation,' in *CEJF* III, essay 21, esp 336-43.

[62] See 'Marriage: A Basic and Exigent Good', *CEJF* III, essay 20, esp 325-9, 333.

needlessness[63] of imposing the law against sexual-orientation discrimination on the employment practices of the schools concerned about chastity as philosophically and religiously conceived, under conditions of widespread availability of alternative places of employment. Such disproportionality by needlessness was even more vividly manifested by the law[64] prohibiting adoption agencies from continuing to give effect to their judgment – the judgment shared until the other day by everyone – that both the unchastity and the lack of complementarity involved in adoption by same-sex sex-partners should count at least as a negative factor, if not a disqualification, in decisions about adoption. For this closure was compelled (in effect) by the law despite the availability to would-be same-sex adopters of other, vastly more numerous other adoption agencies willing to cater for them. And similarly with other cases of conscientious objection by employees[65] or would-be foster parents[66] unwilling to cooperate with what they consider unchastity and injustice to children,[67] and whose position could easily have been accommodated without material detriment to the public policies to which they (reasonably) objected. In all these cases, the courts have proceeded straight from affirming the legitimacy of an anti-discriminatory aim, and the efficacy of the anti-discrimination policy's means, to concluding that the policy was justified and the conduct it prohibited was discrimination in the genuine sense: *unjustified* differentiation. These courts neglected their duty to

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[63] The British Prime Minister, responding in January 2007 to the request that certain faith-based adoption agencies be permitted to continue to decline to provide their services to same-sex couples, wrote: 'I start from a very firm foundation: there is no place in our society for discrimination. That is why I support the right of gay couples to apply to adopt like any other couple. And that is why there can be no exemptions for faith-based adoption agencies offering publicly-funded services from regulations which prevent discrimination.' (Quoted in *Catholic Care (Diocese of Leeds) v Charity Commission* [2010] EWHC 520 (Ch) at para 7.) The reference to public funding was misleading; the prohibition imposed by the provisions then about to be imposed (Equality Act (Sexual Orientation) Regulations 2007) made it unlawful to discriminate on grounds of sexual orientation in the providing of a service 'to the public or a section of the public', irrespective of the funding or otherwise of that providing of a service; likewise under the Equality Act 2010, s 29, which supersedes the regulations. The 'firm foundation' asserted by Mr Blair is mushy and unstable, for the reason suggested by the judge, Briggs J, in the case just cited (at para 73):

> . . . whereas, under Article 14 [of the European Convention on Human Rights], justified differential treatment is not defined as discrimination at all, the Regulations contain a broader definition of discrimination, and then provide exceptions which mean that discrimination, thus defined, is not prohibited. Nonetheless that different use of the word discrimination does not mask the reality that the exceptions in the Regulations are designed to serve as a means of permitting justified differential treatment, as contemplated by Article 14.

The question is always whether differential treatment is justified, and that question is suppressed by conclusory use (such as the Prime Minister's) of the term 'discrimination', use which treats the conclusion as a premise ('that is why…').

[64] Equality Act 2010, s 29.

[65] *Islington London Borough Council v Ladele* [2009] EWCA (Civ) 1357, [2010] 1 WLR 955: a registrar employed in the Council's registry of marriages complained of discrimination for being disciplined by the Council for being unwilling on religious grounds to conduct civil partnership ceremonies (which are always with a view to or in recognition of same-sex sex acts); it was not denied that it would have been easy for the Council to use other registrars in its employment to conduct any and all such ceremonies instead of Ms Ladele, and to do so without imposing disparate burdens on those other registrars or unfairly lightening her load

[66] *R (Johns) v Derby County Council* [2011] EWHC 375 (Admin). As in *Ladele*, a central issue was whether the Council's enforcement of its sexual-orientation anti-discrimination policy amounted to unlawful indirect discrimination against persons (here would-be foster parents for children under eight years of age) who were disproportionately affected by that policy or its enforcement – disproportionately because without sufficient reason.

[67] The effect of the cases cited in the two preceding footnotes was summarized by the First-Tier Tribunal (Charity) of the General Regulatory Chamber in *Catholic Care (Diocese of Leeds) v Charity Commission*, CA/2010/0007, decision of 26 April 2011, para 14: 'religious belief *cannot* provide a lawful justification for discrimination on grounds of sexual orientation in the delivery of a *public-facing service* such as the operation of a *voluntary* adoption agency' (emphases added; the law in no way turns on the provision or non-provision of public funds). The concept of accommodation (or reasonable concordancy) is completely absent from the Tribunal's reasoning and approach.

consider whether the means (the policy) was not only effective but proportionate, i.e., did not affect people's legitimate interest in other recognized rights *more than was needed by* the legitimate aim.[68]

Of course, to find oneself discussing these matters in terms of accommodation of faith or conscience is to notice how radically and damagingly the core issues are distorted by framing them in terms of equality and discrimination. Core questions about a country's desirable characteristics – its self-determination, stability and demographic sustainability, its rule of law, prosperity, and social welfare, the unselfishness and fidelity of its citizens -- are lost to view when the truths of equality of human rights and entitlement to be treated on one's individual merits are affirmed without attention to truths about differences and about the social and cultural *pre-conditions* of those desirable characteristics. So too the discourse—and consequent legal regime—about discrimination, harassment and victimization effectively suppresses, or at best misframes and distorts, rational discourse and sensible judgment about the interests of children and the conditions of demographic and cultural sustainability. Consider the transformation in two decades of English law affecting its most fundamental social relationships, the familial. In 1988, to maintain the historic judgments of its people, Parliament ruled that *public* authorities should not 'promote the teaching . . . of the acceptability of homosexuality as a pretended family relationship'.[69] By 2007, statutory and judicial rulings had made it unlawful for any public person or body, and for any *private* person or body *employing* anyone or *offering any service* to the public, to use the philosophically sound criteria of chastity and marital and familial integrity in the course of assessing

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[68] Thus the Divisional Court in *Johns*, at paras 76-79, disposed of the indirect discrimination issue by quoting the way it had been disposed of by the appellate employment tribunal and the Court of Appeal in *Ladele*:

> . . . Once it is accepted that the aim of providing the service on a non-discriminatory basis was legitimate… it must follow that the council were entitled to require all registrars to perform the full range of services. They were entitled in these circumstances to say that the claimant could not pick and choose what duties she would perform depending upon whether they were in accordance with her religious views, at least in circumstances where her personal stance involved discrimination on grounds of sexual orientation. That stance was inconsistent with the non-discriminatory objectives which the council thought it important to espouse both to their staff and the wider community. It would necessarily undermine the council's clear commitment to that objective if it were to connive in allowing the claimant to manifest her belief by refusing to do civil partnership duties.

[Sir Patrick Elias P; this passage of the Employment Appeals Tribunal judgment was specifically approved by the Court of Appeal, which added:]

> . . . the fact that Ms Ladele's refusal to perform civil partnerships was based on her religious view of marriage could not justify the conclusion that Islington should not be allowed to implement its aim to the full, namely that all registrars should perform civil partnerships as part of its Dignity for All policy. Ms Ladele was employed in a public job and was working for a public authority; she was being required to perform a purely secular task, which was being treated as part of her job; Ms Ladele's refusal to perform that task involved discriminating against gay people in the course of that job; she was being asked to perform the task because of Islington's Dignity for All policy, whose laudable aim was to avoid, or at least minimise, discrimination both among Islington's employees, and as between Islington (and its employees) and those in the community they served; Ms Ladele's refusal was causing offence to at least two of her gay colleagues; Ms Ladele's objection was based on her view of marriage, which was not a core part of her [Christian] religion; and Islington's requirement in no way prevented her from worshipping as she wished.

Neither passage even begins to confront the question of accommodation or minimum necessary impact (or practical concordancy). In para 83, the Divisional Court in *Johns* noted that the American doctrine of reasonable accommodation of religious beliefs had been stressed by counsel for the applicants (citing the decision of Krieger J, sitting in the United States District Court for the District of Colorado, in *Buonanno v A T & T Broadband LLC* (2004) 313 F Supp 2d 1069); but it disposed of the argument simply by citing the above-quoted passage from the leading Court of Appeal judgment in *Ladele*, quite unresponsive to the issue.

[69] Local Government Act 1988, s 28, repealed by Local Government Act 2003, s 122.

how employing openly unchaste homosexuals, or how providing a service promoting the acceptability of homosexual sex relationships, might affect the long-term wellbeing of children and their families, and the rights of those children's parents. Innumerable bystanders and participants in this revolution assumed that what was at stake was no more than the protection of a small minority with a certain presumed inborn predisposition against denials of employment or service unrelated to their competence, their conduct, or their proselytizing for an unchaste way of life. Such bystanders or participants, like the political debate (such as it was) itself, and the subsequent course of litigation and adjudication, lost sight of the consequences for the children in their care and the culture (and thus the future) of their people as a whole.[70]

Consider, finally, two further kinds of side effect. One kind is immediately perceptible, the other not so immediately manifested. Just as immediate as the very considerable extension of state coercive power into private associational relationships now made subject to litigation (not to mention prosecution) by the supposedly under-represented and their organized advocates is the very considerable further shrinking of freedom of speech and debate about matters of authentic public concern – a contraction that is one of the most notable features of the last decades. Even to suggest that some group defined by one or other of the protected categories is not in fact under-represented but perhaps over-represented in awards, grades, appointments, promotions, assemblies and the like, or is not in fact over-represented in criminal conviction rates or arrests or searches but perhaps under-represented, is to risk legal proceedings of numerous kinds, some directly related to alleged discrimination, some to alleged harassment, some taking the form of questioning or arrest by the police, some the form of prosecution. And it is to risk dismissal from one's employment under contractual provisions or employers' regulations (like this university's) about causing offence or distress to customers, students, and the like, provisions and regulations which it would be very rash not to assume will regularly trump old-fashioned provisions and assumptions about, say, academic tenure or academic freedom. The virtual non-discussability, in many contexts, of important questions of fact, such as the existence or non-existence or scale of ethnic or sex-based differences in aptitude, or the reversibility or

[70]For an instance of such inattention to consequences such as impact on children and culture, consider the principal finding of the US Supreme Court in *Romer v Evans* 517 US 620 (1996)—that the people of Colorado must have been motivated by animus rather than reasons when they voted to reserve to the state-wide electorate the inclusion of 'sexual orientation' in anti-discrimination ordinances and laws. This finding is so unrooted in evidence or commonsense that, presuming absence of animus in the Court, it must have resulted from that kind of inattention. The fact that in 2000 the State of New Jersey came within one Supreme Court vote (*Boy Scouts of America v Dale* 530 US 640 (2000)) of forcing the Boy Scouts to submit to the appointment of homosexual activists (see n 60 above) as scoutmasters for their boys—an amazing exertion of state power over private, parental rights and children's interests—illustrates the reality of the concerns that motivated very many voters in Colorado in 1992 (as I learned in 1993 by examining referendum campaign literature while preparing to act as a witness for the state in *Evans v Romer* in the Colorado District Court), voters who—as far as the record showed—were not disposed to harass or victimize homosexuals, or discriminate against them in any way save the 'discrimination' involved in seeking to protect their own children's upbringing from example and influence they reasonably judged quite likely to be damagingly bad. Just how harmful, and how pervasive and insistent, that example and influence would be, when driven by official insistence on redressive equality of esteem and representation of lifestyles, these concerned parents now seem likely to have seriously *under*-estimated.

irreversibility of sexual orientation or the relation if any between sexual orientation and child-abuse, or the bad side effects of large-scale immigration to this country by people of some ethnicities or religions, is a very perceptible and immediate restriction on liberty.[71]

And that in turn will reinforce the less immediate bad side effects of prioritizing equality in the manner of the Equality Act 2010. These are, paradigmatically, the effects on competence in the very many occupations and positions where incompetence is not only wasteful but harmful;[72] and the effects on children and thus, further, on all whose wellbeing will be affected by the incompetence or the emotional instability of those children as and when they come of age. The equality-driven double sexualization of the military is an analogous kind of case; assurances that there will be no degradation of command and combat performance are as credible as the assurances one could hear from many family law scholars and experts through the 1970s and 1980s that unilaterally obtainable no-fault divorce would do no or negligible harm to the stability of marriages or to the willingness of people to make the commitment of marriage, or to the children of divorcing or divorced parents. That there would be very extensive and substantial bad effects could be and was predicted by anyone of some sense and experience not committed to promoting the obvious immediate benefits of divorce. But it took a full generation for those less immediate bad effects to be documented by social science. And that they are *effects* remains in dispute amongst scholars -- who have established, nonetheless, that the couples who relatively flourish all round and succeed relatively more in raising relatively flourishing children use their sense, and the experience available to them, to make the judgment that undertaking stable and committed marriage is the appropriate matrix for their venture.[73] So, I am afraid, it will in all likelihood be with the military, if the degradation of combat performance resulting from these two sexualizations -- changes introduced in the name of equality and resisted, with amply stated reasons, by officers of good sense and experience -- happens not to contribute decisively to defeats in the end catastrophic for the continuance of objective historical investigation. Likewise, *mutatis mutandis*, for other domains of social life, where reduction of average (mean or median) competence may be less life-threatening but will be damaging nonetheless. Meantime, such bad side effects, truly important for the common good, are hard to demonstrate in the short-term perspective of anti-discrimination litigation about proportionality, a demonstration made harder

[71] For the origins of 'hate'-speech law in conceptions of equality, and some critique suggesting some of the threats to equality created by such law, see Adrienne Stone, 'How to Think about the Problem of Hate Speech: Understanding a Comparative Debate', in Katharine Gelber and Adrienne Stone, eds, *Hate Speech and Freedom of Speech in Australia* (Sydney: Federation Press, 2007), 59-81. The chilling effect of such laws creates and/or reinforces a new conventional zone of undiscussability wider, in some respects, than the (uncertain) boundaries of the legal provisions themselves.

[72] One example among many: Christopher Burchfield's well documented *The Tinder Box: How Politically Correct Ideology Destroyed the US Forest Service* (Stairway Press, 2012) (for 'destroyed… service' read 'very seriously impaired… the service and its forests' in pursuit of the employment quota of 43% female).

[73] A balanced review of evidence is Marsh Garrison, 'The Decline of Formal Marriage: Inevitable or Reversible?' Family Law Q. 41 (2007) 491-520

by fear of allegations of offence, insult or any one of the many available career-imperilling or -terminating accusations of bias, bigotry, 'phobia', racism or fascism.

The last six paragraphs by no means exhaust the sorts of bad side effects of much in anti-discrimination law of the kind now relevant. Among the other sorts, perhaps more important but also more difficult to document and demonstrate, is the reinforcement of the increasingly widespread and widely taught presumption that the civilization which these laws partly reshape is a guilty one. On this presumption, the civilization (ours) is guilty because it has always acknowledged and *evaluated* differences between lifestyles or cultures (and gave legal and/or other social effect to those valuations) and because the continuing differences in competence and/or fitness for purpose, differences uneradicated by these laws, are attributed not to anything innate or inherent or self-imposed but to the bias and ill-will (as it is conceived to be) of that civilization's historic main religious and cultural/ethnic representatives and components. Such presumptions of guilt,[74] presumptions no less effectively internalized and pervasive for being ill-informed, unreasonable, even perversely unbalanced, can seriously distort the maintenance or development of public policy on issues affecting the sustainability of our societies and their order of justice.

5. *Equality and Inequality for Common Good*

So we still can learn from Aristotle when he defines[75] justice as the will for common good, in which the due share to which everyone is entitled varies not only with individual desert, need, and ability but also by decision-makers' care for the sustainable flourishing of the whole community considered in all its complex past, present and foreseeable inter-dependencies over the medium and long term (but considered without secret preference for the decision makers, the ruling class, as such, without disdain for others because *other*: rendering to others what is theirs 'as a matter of equality'[76]). And learn, too, from Plato's teasing with the complex irony of Socrates's Phoenician Tale, at the heart of the *Republic*, in which the thought that all human persons are equal because all children of mother earth is presented by Socrates as a

[74] This is intertwined, often enough, with a kind of societal self-hatred of the kind sketched in Joseph Ratzinger's address in May 2004 to the Italian Senate in Joseph Ratzinger and Marcello Pera, *Without Roots* (New York: Basic Books, 2006), 78 (and see 87-88), and with the kind of fear—lack of independence of mind, and lack of courage and a sense of responsibility—perceptively anticipated in Alexis de Tocqueville's speculation about despotism in apathetic democracies, *Democracy in America*, vol II (1840) sec 4 chs 6-7, and particularized to present circumstances in Oriana Fallaci's paraphrase and extension of Tocqueville's hypothesis, in her very informal but penetrating *The Force of Reason* (New York: Rizzoli International, 2006), 245-7. For a concise introduction to aspects of the political philosophy of equality not taken up in the present essay, see Pierre Manent, 'Tocqueville, Political Philosopher', in *The Cambridge Companion to Tocqueville*, ed Cheryl B Welch (Cambridge: Cambridge University Press, 2006), ch 4.

[75] See *Politics* III.12: 1282b20-83a22. On the standing tendency of a more or less corruptly democratic prejudice, see V.1: 1301a28-29, 32-3: 'Democracy…arises out of the notion that those who are equal in any respect are equal in all respects; because men are equally free, they claim to be absolutely equal. … The democrats think that as they are equal they ought to be equal in all things.'

[76] Aquinas, *Summa Theologiae*, II-II q 80 a un. c: 'ratio vero iustitiae consistit in hoc quod alteri reddatur quod ei debetur secundum aequalitatem: justice essentially consists in giving the other what he or she is owed as a matter of equality.'

notable and salutary falsehood which is as near to the truth as we can get.[77] And we still can learn from Hart, with his insistent reminders that justice is in treating like cases alike *and* different cases differently. Indeed, the salutary proposition of his with which I began (not forgetting its subtextually intended neutrality) was that individuals are often *entitled* to a certain position of… inequality.

[77] Plato, *Republic* III 414b-c with II 382c-d and III 389b-c. On the translation of *gennaion pseudos*, and the interpretation of the Tale, see Eric Voegelin, *Plato and Aristotle* (Louisiana State UP, 1957), 104-8. For the usual translation, 'noble lie', see e.g. Daniel Dombrowski, 'Plato's "Noble" Lie', History of Political Thought 18 (1997) 565-78.